Solid Gold Publishers Sdn Bhd v Chan Wee Ho & Ors

HIGH COURT (MELAKA) — CIVIL SUIT NO 22-78-1996-2000
LOW HOP BING J
28 JUNE 2002

Civil Procedure *— Anton Piller order — Damages — Assessment of damages consequent to setting aside Anton Piller order — Principles governing such assessment*

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This appeal concerned the assessment of damages by the registrar consequent to the setting aside of an Anton Piller order. The plaintiff contended that the registrar misdirected herself on the evidence whereas the defendants submitted that the registrar was correct in her assessment of damages.

Held, dismissing the appeal with costs:

(1) The assessment of damages is an exercise of discretion. This discretion however is not unfettered and is not to be exercised capriciously or improperly. It is exercised by reference to and application of established judicial principles, having regard to the facts and circumstances unfolded by the evidence adduced (see pp 312H–313A).

(2) The principles governing the assessment of damages consequent to the setting aside of an Anton Piller order are: (a) the claimant for damages must prove the damage; (b) awards of exemplary damages should be moderate; (c) where exemplary damages are to be awarded, evidence of the tortfeasor's means is material; (d) the principle of *restitutio in integrum* applies; and (e) there should be no unfair enrichment. The claimant is not to profit by the award of damages (see p 313A–G).

(3) On the facts, the registrar's decision in the assessment of damages was moderate and reasonable and there was no misdirection on the facts or the law. Neither was there any miscarriage of justice (see p 314F).

[Bahasa Malaysia summary

Ini adalah rayuan berkaitan penilaian ganti rugi oleh pendaftar berikutan penepian perintah Anton Piller. Plaintiff menegaskan bahawa pendaftar telah salah arah atas keterangan manakala defendan-defendan telah menghujahkan bahawa pendaftar adalah betul dalam penilaian ganti rugi beliau.

Diputuskan, menolak rayuan tersebut dengan kos:

(1) Penilaian ganti rugi adalah satu pelaksanaan budi bicara. Budi bicara ini bagaimanapun tidak terlepas daripada belenggu dan ia tidak boleh digunakan secara tidak menentu atau tidak betul. Ia digunakan dengan rujukan dan pemakaian terhadap prinsip-prinsip kehakiman, dengan mengambilkira fakta-fakta dan keadaan-keadaan yang didedahkan oleh keterangan yang telah dikemukakan (lihat ms 312H–313A).

(2) Prinsip-prinsip yang mengawal penilaian ganti rugi berikutan penepian satu perintah Anton Piller adalah: (a) penuntut untuk ganti rugi mesti membuktikan kerugian; (b) award untuk ganti rugi teladan patut sederhana; (c) di mana ganti rugi teladan akan diawardkan, keterangan sumber pendapatan pelaku tort adalah material; (d) prinsip *restitutio in integrum* terpakai; dan (e) tidak sepatutnya terdapat pengkayaan yang tidak adil. Penuntut tidak sepatutnya mendapat untung daripada award ganti rugi tersebut (lihat ms 313A–G).

(3) Berdasarkan fakta-fakta tersebut, keputusan pendaftar dalam penilaian ganti rugi tersebut adalah sederhana dan munasabah dan tidak terdapat salah arah pada fakta-fakta atau undang-undang. Juga tiada terdapat apa-apa kesalahan pelaksanaan keadilan (lihat ms 314F).]

Notes

For cases damages, Anton Piller order, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 502.

For cases assessment of damages, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1919–1927.

Cases referred to

Bonham-Carter v Hyde Park Hotel [1948] 64 TLR 178 (refd)
C & P Haulage (A Firm) v Middleton [1983] 3 All ER 94 (refd)
Flint v Lovell [1935] 1 KB 354 (refd)
John v Dharmaratnam [1962] MLJ 187 (refd)
Livingstone v The Rawyards Coal Co (1880) 5 App Cas 25 (refd)
Rookes v Barnard [1964] 1 All ER 367 (refd)
Subramaniam all Daramasivam & Ors v Malaysian Airlines Systems Bhd [2002] 1 MLJ 45 (refd)
Tan Sri Khoo Teck Puat & Anor v Plentitude Holdings Sdn Bhd [1994] 3 MLJ 777 (refd)
XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd [1985] 155 CLR 488 (refd)

SG Lingam (*SG Lingam & Co*) for the appellant/plaintiff.
WS Goh (*WS Goh & Assoc*) for the fourth, fifth and sixth defendants.

Low Hop Bing J:

Appeal

This is an appeal in encl (7) by the plaintiff against the whole of the learned registrar's decision given on 30 July 1999 in the following terms:

(1) general damages in the sum of RM86,651.40 for the loss of revenue arising from the plaintiff's seizure of 418 video tapes;

(2) general damages in the sum of RM4,598 to replace 48 of the missing video tapes;

(3) exemplary damages in the sum of RM50,000;

(4) interest on all the aforesaid damages at 6% pa from 24 October 1996 to 30 July 1999 and thereafter at 8% pa from 31 July 1999 until full realization; and

(5) costs to be agreed or assessed.

Facts of the case

The plaintiff had on 24 October 1996 obtained an Anton Piller order and raided the defendants' premises as a result of which 418 video tapes were seized. Subsequent thereto, defendants 4, 5 and 6 successfully applied to set aside the Anton Piller order, with a consequential order for assessment of damages by the learned registrar. The learned registrar proceeded therewith and gave an order in the aforesaid terms.

A total of 418 video tapes were seized by the plaintiff on 24 October 1998 and 370 tapes were returned on 14 September 1998, ie after a lapse of 701 days. 48 tapes were missing. Mr SG Lingam, learned counsel for the appellant plaintiff, in the appeal before me, confined the appeal to items 1 and 3 of the learned registrar's aforesaid order.

Counsel's submission and court's decision

It was submitted for the plaintiff that the statements of account tendered for the defendant cannot be accepted as the maker was not called. Plaintiff's learned counsel however conceded that the learned registrar has stated the correct principles governing the assessment of damages, but has misdirected herself on the evidence; ie by taking into account evidence which should not have been taken into account.

Mr WS Goh, learned counsel for defendants 4, 5 and 6, submitted that the learned registrar has arrived at a correct assessment of damages and therefore the decision should be upheld.

In my judgment, it is trite law that the task of undertaking an assessment of damages is essentially an exercise of discretion. However, this discretion is not an unfettered discretion and so not to be exercised capriciously or improperly or based on whims and fancies or by tossing a coin, but by reference to and application of established judicial principles,

having regard to the facts and circumstances unfolded in the evidence adduced before the learned registrar who undertakes the assessment.

With particular reference to the assessment of damages consequent upon the setting aside of an Anton Piller order, it is my considered view that the governing principles may be stated as follows:

(1) The claimant for damages must prove the damage; 'it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying : This is what I have lost, I ask you to give me these damages.' per Lord Goddard CJ in *Bonham-Carter v Hyde Park Hotel* [1948] 64 TLR 178 at p 179, which was followed, inter alia, by Kang Hwee Gee J in *Subramaniam a/l Daramasivam & Ors v Malaysian Airlines Systems Bhd* [2002] 1 MLJ 45 at p 62; *John v Dharmaratnam* [1962] MLJ 187; and *Tan Sri Khoo Teck Puat & Anor v Plentitude Holdings Sdn Bhd* [1994] 3 MLJ 777 (FC).

(2) Awards of exemplary damages should be moderate: *Rookes v Barnard* [1964] 1 All ER 367.

(3) Where exemplary damages may properly be awarded to deter the tortfeasor, evidence of his means is material not only to show that he can afford to satisfy a substantial judgment ... but to show what sum will be a sufficient deterrent against the repetition of the conduct that attracts the award: *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* [1985] 155 CLR 488.

(4) The principle of *restitutio in integrum* applies ie 'that sum of money which will put the party who has been injured, or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation' per Lord Blackburn in *Livingstone v The Rawyards Coal Co* (1880) 5 App Cas 25 at p 39 which was followed by Kang Hwee Gee J in *Subramaniam*. By way of further elaboration, I would add that this is the fundamental principle by which the courts are guided in awarding damages. The law will endeavour, so far as monetary compensation can do, to replace an injured party in the same original position occupied by him before the occurrence of the injury or wrongful act. This principle has application both in a breach of contract or in the commission of a wrongful or tortious act.

(5) There shall be no unfair enrichment or the claimant should not be allowed to profit by an award of damages: *Subramaniam*, following *Tan Sri Khoo Teck Puat* (FC); and *C & P Haulage (A Firm) v Middleton* [1983] 3 All ER 94 (CA).

Having stated the aforesaid governing principles, I shall now proceed to examine and evaluate the evidence adduced before the learned registrar in order to determine the correctness of her decision.

Defendant 5, Goh Kok Chai, testified that one Poh Ah Mun, an accountant from the firm of accountants KF Cheong & Co, has been instructed by him to prepare the annual income tax returns for defendants 4, 5 and 6 and to produce as evidence the returns for the relevant years of

assessment viz 1996, 1997 and 1998. Each video tape is rented at RM3 daily.

The said accountant testified and arrived at an estimate that for the 418 tapes seized by the plaintiff, there was a loss of revenue of RM288,838 by way of rental. He claimed a sum of RM1.5m by way of exemplary damages.

The astronomical figures have obviously been rejected by the learned registrar. On my part, I hold that the figures claimed by the defendants would run counter to the aforesaid governing principles generally. In particular, the defendants' figures are not moderate, militate against the principle of *restitutio in integrum* and constitute an unfair enrichment.

In her grounds of decision, regarding items 1 and 3 above, the learned registrar after a careful consideration and computation allowed RM86,651.40 by way of loss of revenue and a sum of RM50,000 by way of exemplary damages. There is no submission before me that the learned registrar has wrongly exercised her discretion in the light of the aforesaid principles governing the assessment of damages.

In my appellate capacity, I shall be slow in reversing the learned registrar's assessment. The same judicial sentiment was succinctly stated by Kang Hwee Gee, J in *Subramaniam*, when the learned judge quoted Greer LJ who in *Flint v Lovell* [1935] 1 KB 354 at p 360 observed as follows :

> ... this court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages, it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

Having perused the entire evidence and appeal record herein, I am of the view that the learned registrar's decision in the assessment of damages is moderate and reasonable and that there was no misdirection on the facts or the law, neither was there any miscarriage of justice. I, therefore, affirm her decision and dismiss this appeal with costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon